U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: **April 14, 1999**

Case No. 1998-INA-295

In the Matter of:

BON VIVANT RESTAURANT,
Employer,

on behalf of:

EMILIANO GALLARDO,
Alien.

Certifying Officer: Delores DeHaan
New York, NY

Appearance: William Pryor, Esq.

Before: Holmes, Lawson and Wood
Administrative Law Judges

JAMES W. LAWSON
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application filed on behalf of the alien by the employer under §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A) (the Act) and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer (CO) of the U.S. Department of Labor (DOL) issued a Final Determination (FD) denying the application, the Employer requested review pursuant to 20 CFR § 656.26.[2]

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[1]The following decision is based on the record upon which the CO denied certification, including the Notice of Findings (NOF), rebuttal and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

[2]Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

THE PROCEEDINGS

Employer seeks to fill the position of a Greek Cook with DOT Title , DOT # 313.361-030, a wage offer of $325.31 per week, job duties of:

> Prepare all Greek foods such as mousaka, souvlaki, pasticho. Measure and mix ingredients. Add seasoning, gravies or sauces based on experience.

Minimum job requirements were stated as two years of experience in the job offered or two years of experience in the related occupation working as a Salad Maker, Greek food.

The application was denied by the CO on the basis that the employer failed to offer the prevailing wage rate of pay pursuant to the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.*, 20 C.F.R Part 4. Based on the CO's findings, the advertised job met the Service Contract Act's definition of Cook II and thus, the prevailing wage rate of pay of that particular occupation was substantially higher than what the employer was offering. (AF 37) Therefore, in the NOF, employer was advised to amend its wage offer of $325.31 per week to $610.05 per week or submit countervailing evidence that the prevailing wage determination was in error. (AF 25) Since employer did not cure the deficiencies, the application for labor certification was denied. (AF 37)

CONTENTIONS ON APPEAL

On appeal, employer contends, among other things, that the rate of pay under the Service Contract Act is inapplicable and inappropriate to the offered position. Employer argues that the Service Contract Act applies to employment contracts where a party is the government or an agency of the government; not to private employers. Employer maintains that it has no contract with the federal government or with any federal agency, and, therefore, is not required under the Service Contract Act to offer the prevailing wage rate in accordance with the Act. It is the

employer's further contention that the CO erred in equating the job description for Cook II to the job description for Specialty Cook, Foreign Foods, pointing out the fact that there is a distinct difference between the two occupations. Based on the DOT description of the jobs, a Cook II occupation entails volume cooking for large numbers of people in institutional settings such as cafeterias; whereas a Specialty Cook, Foreign Food prepares meals individually as ordered. Given the dissimilarities between the two occupations, the offered position does not qualify as a Cook II and should not be subject to a wage determination under the Service Contract Act.

DISCUSSION

By April 17, 1997 letter the state agency requested employer to respond to its attachment which stated:

> WE WERE INSTRUCTED BY REGIONAL OFFICE TO USE FROM NOW ON THE SERVICE CONTRACT ACT FOR SPECIALTY & PLAIN COOKS
>
> The prevailing rate of pay for this job is $ 17.43 PER HOUR
> *****
> The source of this wage is THE SERVICE CONTRACT ACT. (AF 15)

The employer's May 21, 1997 letter disputed the use of the Service Contract Act contending that "the duties of Cook II of the Service Act[3] is different than the description of the duties of the Cook, Specialty Foreign Food, Dictionary of Occupational Titles",[4]

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[3] **07042 COOK II** Prepares in large quantities, by various methods of cooking, meat, poultry, fish, vegetables, etc. Seasons and cooks all cuts of various meats, fish and poultry. Boils, steams or fries vegetables. Makes gravies, soups, sauces, roasts, meat pies, fricassees, casseroles, and stews. Excludes food service supervisors and head cooks who exercise general supervision over kitchen activities. (AF 21)

[4] **313.361-030 COOK, SPECIALTY, FOREIGN FOOD (hotel & rest.)** Plans menus and cooks foreign-style dishes, dinners, desserts, and other foods, according to recipes: Prepares meats, soups, sauces, vegetables, and other foods prior to cooking. Seasons and cooks food according to prescribed method. Portions and garnishes food. Serves food to waiters on order. Estimates food consumption and requisitions or purchases supplies. Usually employed in restaurant specializing in foreign cuisine, such as French, Scandinavian, German, Swiss, Italian, Spanish, Hungarian, and Cantonese. May be designated according to type of food specialty prepared as Cook, Chinese-Style Food (hotel & rest.); Cook, Italian-Style Food (hotel & rest.); Cook, Kosher-Style Food (hotel & rest.); Cook, Spanish-Style Food (hotel & rest.).
GOE: 05.10.08 STRENGTH: M GED: R3 M3 L2 SVP: 7 DLU: 77

arguing that otherwise there would be no distinction between the latter and Cook Restaurant.[5] (AF 17-23)

The NOF found:

> Employer's wage offer of $325.31 per week is below the prevailing wage of 610.05 per week. In accordance with 20 CFR 656.40 (a)(1), the occupation of Cook, Speciality Foreign Foods is one for which a prevailing wage determination has been made pursuant to the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 et seq. 29 CFR Part 4. The 5 percent variance as defined in 656.40 (2)(i) does not apply. (AF 25)

and attached the state agency transmittal which indicated under "Method of Determining Prevailing Wage:" "McNamara (sic)-O'Hara Act 94-2375." (AF 24)

The FD held:

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[5] **313.361-014 COOK (hotel & rest.) alternate titles**: **cook, restaurant**
Prepares, seasons, and cooks soups, meats, vegetables, desserts, and other foodstuffs for consumption in eating establishments: Reads menus to estimate food requirements and orders food from supplier or procures food from storage. Adjusts thermostat controls to regulate temperature of overs, broilers, grills, roasters, and steam kettles. Measures and mixes ingredients according to recipe, using variety of kitchen utensils and equipment, such as blenders, mixers, grinders, slicers, and tenderizers, to prepare soups, salads, gravies, desserts, sauces, and casseroles. Bakes, roasts, broils, and steams meats, fish, vegetables, and other foods. Adds seasoning to foods during mixing or cooking, according to personal judgment and experience. Observes and tests foods being cooked by tasting, smelling, and piercing with fork to determine that it is cooked. Carves meats, portions food on serving plates, adds gravies and sauces, and garnishes servings to fill orders. May supervise other cooks and kitchen employees. May wash, peel, cut, and shred vegetables and fruits to prepare them for use. May butcher chickens, fish, and shellfish. May cut, trim, and bone meat prior to cooking. May bake bread, rolls, cakes, and pastry [BAKER (hotel & rest.) 313.381-010]. May price items on menu. May be designated according to meal cooked or shift worked as Cook, Dinner (hotel & rest.); Cook, Morning (hotel & rest.); or according to food item prepared as Cook, Roast (hotel & rest.); Cook, Fry (hotel & rest.); Cook, Night (hotel & rest.); Cook, Vegetable (hotel & rest.). May oversee work of patients assigned to kitchen for work therapy purposes when working in psychiatric hospital.
GOE: 05.05.17 STRENGTH: M GED: R3 M3 L3 SVP: 7 DLU: 81

> Employer is advised that the occupation of Foreign Specialty Cook meets the SCA definition of Cook II and that the cuisine is immaterial since the job offer includes cooking duties. Therefore the SCA wage is the prevailing wage for the job as described. (AF 37)

In determining the prevailing wage under § 656.40(a)(1), if the job opportunity is in an occupation which is subject to a wage determination under the Davis-Bacon Act, 40 U.S.C. §§ 276a et seq., 29 C.F.R. Part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. §§ 351 et seq., 29 C.F.R. Part 4, the prevailing wage is the rate required under the statutory determination. *Standard Dry Wall*, 88-INA-99 (May 24, 1988) (en banc). The employer's brief in support of appeal points out substantial differences in the duties of Cook II and Specialty Cook of Foreign Foods. It does not seem apparent that "the occupation of Foreign Specialty Cook meets the SCA definition of Cook II" as stated in the FD. Nor is the FD rationale sufficient that "the cuisine is immaterial since the job offer includes cooking duties." The same rationale would apply to the SCA Cook I and to all of the DOT cook occupations. It appears that the CO has attempted to rationalize the unexplained above quoted instruction by the Regional Office. Nor did the CO sufficiently inform the employer of the basis of the instruction when it supplied a state agency document citing "Cook II McNammara-O'Hara Act 94-2375" without supplying a copy of that reference. As stated in *John Lehne & Son*, 89-INA-267 and 89-INA-313 (May 1, 1992) (en banc):

> The burden of persuasion rests with the Employer seeking to challenge the CO's prevailing wage determination. However, placement of this burden on the Employer presumes that the Employer knows the source and basis for the CO's determination.
>
> In John Lehne I and John Lehne II, the CO did not provide the source of the prevailing wage determination to the Employer with the issuance of the NOF, other than to note that the occupation of painter was covered by the Davis-Bacon Act. It is unreasonable to require that an employer rebut a wage rate of ambiguous or unknown origin, or one which is not easily accessible. This is particularly true where, as in John Lehne II the CO cited reliance upon the Department of Labor General Wage Decision CA89-2, yet failed to provide a copy of the relevant portions of this Decision to the Employer. Consequently, in those cases where the wage rate is in dispute, it is incumbent upon the CO to provide a copy of the relevant portions of his or her source for the prevailing wage determination with the NOF.
>
> In addition, if an employer challenges the CO's Davis-Bacon wage determination in rebuttal, then the CO must provide a reasonable explanation of how the prevailing wage was determined from the Davis-Bacon schedule, and why it was appropriate under the circumstances. It is unclear under the circumstances of the present cases whether the CO's wage determinations were appropriate.
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> On remand, the CO should provide to the employer a copy of the referenced document as

well as any relevant Regional Office instructions, and justification of classification under the Service Contract Act. If the prevailing wage issue is resolved in favor of employer, the CO may of course consider any other criteria applicable to certification.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **REMANDED** for further action consistent with this decision.

For the Panel:

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JAMES W. LAWSON
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

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